Triangle Building Products, Corp. *and* Local 1205, International Brotherhood of Teamsters, AFL–CIO, Petitioner and Local 2682, United Brotherhood of Carpenters and Joiners of America, Intervenor. Case 29–RC–9662

September 30, 2002

DECISION ON REVIEW AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On July 2, 2001, the Regional Director for Region 29 issued a Decision and Direction of Election (relevant portions of which are attached as an appendix) finding the petitioned-for unit of drivers and other classifications not appropriate but finding instead that a smaller unit of drivers is appropriate. The Regional Director further found that the Employer's recognition of the Intervenor as the representative of a wall-to-wall unit does not bar an election in the unit of drivers because the Petitioner had support of 30 percent of the driver unit at the time of recognition. Thereafter, pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Intervenor and the Employer filed timely requests for review of the Regional Director's determination, contending that a unit of drivers is not an appropriate unit, and that in any event the recognition agreement between the Intervenor and the Employer barred an election in the driver unit. By Order dated August 2, 2001, the Board granted the Intervenor's and the Employer's requests for review. Thereafter, the Petitioner filed a brief on review.

Having carefully considered the entire record, including the brief on review, we find, contrary to the Regional Director, that the Employer's recognition of the Intervenor as the representative of a wall-to-wall unit bars the present petition.

FACTS

On March 21, 2001, the Employer, having reviewed and verified authorization cards, stipulated that the Intervenor had support of a majority of its employees. On that same date, the Employer and the Intervenor entered into a recognition agreement designating the Intervenor as the collective-bargaining representative of a wall-to-wall unit including all production and maintenance employees, carpenters, material handlers, warehousemen, forklift operators, truck drivers, and checkers. Thereafter, on March 26, 2001, a neutral arbitrator conducted an election in the wall-to-wall unit. Of the eligible voters, 36 voted to have the Intervenor represent them for purposes of collective bargaining. One month later, on April 26, 2001, the Petitioner filed the present petition, amended at the hearing, seeking to represent a portion of the recognized unit.[1]

After conducting a hearing, the Regional Director found that the petitioned-for unit was not appropriate. The Regional Director found that most of the employees that the Petitioner sought to represent had work-related contact, were functionally integrated, and had interchange with employees excluded by the petition. The Regional Director then found, however, that a smaller unit of drivers was appropriate and directed an election in that unit. In doing so, the Regional Director reasoned that because the Petitioner had support of 30 percent of the driver unit that predated the Employer's recognition of the Intervenor, the recognition agreement did not bar an election. That the unit found appropriate was smaller than the unit petitioned-for and the recognized unit was, according to the Regional Director, of no consequence. We disagree and find that the Employer's voluntary recognition of the Intervenor does indeed bar an election in the circumstances of this case.

ANALYSIS

The Board first outlined the theory of a recognition bar in representation cases in *Sound Contractors*, 162 NLRB 364 (1966), where it held that after an employer lawfully recognizes a union as the representative of its employees based on a showing of majority support, no petitions can be processed for a reasonable period of time thereafter. In *Rollins Transportation System*, 296 NLRB 793 (1989), the Board limited the application of the recognition bar in circumstances in which there was simultaneous campaigning by competing unions. Specifically, the Board held that a petition was not barred by an employer's voluntary recognition of another union if the petitioning union was organizing employees at the same time as the recognized union and if the petition was filed within a reasonable period of time after recognition.

The Board modified the *Rollins* rule in *Smith's Food & Drug Centers*, 320 NLRB 844 (1996), to permit a petition by a competing union following voluntary recognition of another union only where the petitioning union demonstrates that it had a 30 percent showing of interest

[1] The unit petitioned-for included "all drivers, warehouse assistants, warehouse driver/helpers, yard foremen, gate checkers, warehouse foremen and forklift operators, excluding roof truss leadman, roof truss stacker, truss plant production foremen, truss assemblers, wall paneler sawyer, wall panel component assembly leadman, wall panel plant production foreman, wall panel component assembler, component sawyer, office clerical employees, security guards and other employees by operation of the National Labor Relations Act." There are approximately 21 employees in this unit. The Petitioner had the support of 30 percent of this unit when the Employer recognized the Intervenor. A year prior to these events, the Petitioner had entered into a stipulated election agreement in a larger unit than it currently seeks to represent.

that predates the recognition. The Board explained that the modification was warranted because the *Rollins* rule unnecessarily discouraged employers from voluntarily recognizing unions and unnecessarily frustrated the establishment of new collective-bargaining relationships by permitting post-recognition challenges by competing unions with little or no employee support.

Applying *Smith's Food*, the Board in *American National Can, Inc.*, 321 NLRB 1164 (1996), found that the employer's voluntary recognition of a union was not a bar to a petition filed by a competing union. In that case, the employer voluntarily recognized the Glass, Molders, Pottery, Plastics & Allied Workers International Union, AFL–CIO, CLC, as the bargaining representative of its production and maintenance and skilled craft employees. Prior to the recognition, the American Flint Glass Workers Union was organizing a smaller unit of the employer's apprentice and journeyman mold makers, and it had obtained authorization cards from a majority of the mold makers. The Board acknowledged that the petitioned-for unit of 24 mold makers was substantially smaller than the recognized unit of approximately 397 employees but found that, because the *Smith's Food* requirements were satisfied, that fact alone did not require that the petition be dismissed. In so finding, however, the Board specifically noted that the Regional Director found, and no party disputed, that the petitioned-for unit of mold makers was a separate appropriate unit for bargaining.

The Regional Director likened the present case to *American National Can* and concluded that because the Petitioner had support of 30 percent of the unit found appropriate *by the Regional Director* at the time the Employer recognized the Intervenor, there was no recognition bar. We disagree.

The Board in *Rollins*, as modified by *Smith's Food*, created a narrow exception to the recognition bar rule. Thus, voluntary recognition bars all petitions except those filed by a petitioner that can demonstrate that it had support of 30 percent of the employees in the petitioned-for unit at the time of recognition. While the Board in *American National Can* applied this exception in a situation where the petitioned-for unit was smaller than the recognized unit, critical to the Board's analysis was the finding that the petitioned-for unit was an appropriate unit.

Contrary to the Regional Director, we are unwilling to extend this narrow exception of the recognition bar rule to permit petitions for units that are not appropriate. To do so would create instability and uncertainty regarding voluntarily recognized units. This is particularly true in the present case where the recognized unit is a presumptively appropriate overall unit, a neutral arbitrator conducted an election in this unit, and the Petitioner waited 30 days after the recognition to file its petition. In sum, we find that if a rival union fails to petition for an appropriate unit, the employer's voluntary recognition of the other union constitutes a bar to the petition.[2]

Here, the Regional Director found, and we agree for the reasons stated by him, that the petitioned-for unit is not appropriate. Accordingly, we reverse the Regional Director and find that the Employer's voluntary recognition of the Intervenor as the collective bargaining representative of the employees in a wall-to-wall unit is a bar to the petition.[3]

ORDER

This proceeding is remanded to the Regional Director for further appropriate action consistent with this decision.

Dated, Washington, D.C. September 30, 2002

Wilma B. Liebman, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, dissenting.

Contrary to my colleagues, I would adopt the Regional Director's finding that the voluntary recognition agreement between the Employer and the Intervenor does not bar the processing of the Petitioner's representation petition.

In brief, the relevant facts are these. The Employer is engaged in the retail sale of lumber, cabinets and related building products. On March 21, 2001,[1] it executed a recognition agreement with the Intervenor. In this agreement, the Employer recognized the Intervenor as the majority bargaining representative of employees in

[2] Contrary to our dissenting colleague, *Overnite Transportation*, 331 NLRB 662 (2000), does not require a different result. In that case, which did not involve a voluntary recognition, the union filed a petition to represent certain employees, the parties litigated the appropriateness of that unit and the alternative units, and the Regional Director made a determination of the unit appropriate for collective bargaining. The posture of this case is very different. Here, the Employer and the Intervenor entered into a valid recognition agreement covering an appropriate unit of employees. The Petitioner now seeks to upset that recognition. The Regional Director's role at this juncture is, first, to determine if the recognition is valid and, second, to determine under *Smith's Food* and its progeny if there is any reason not to accord precedence to that recognition. Under *American National Can*, the voluntary recognition is not a bar if the unit sought by the Petitioner is appropriate. Where, as here, the unit sought is not appropriate, the prior valid recognition stands as a bar to the petition.

[3] In finding that the rule enunciated in *Smith's Food & Drug Centers* and *American National Can* is not applicable here, Member Bartlett does not reach the issue of whether those cases were correctly decided.

[1] All dates refer to 2001 unless otherwise indicated.

what appears to be a wall-to-wall unit including all production and maintenance employees, carpenters, material handlers, warehousemen, assemblers, forklift operators, truck drivers, and checkers. On March 26, an independent arbitrator conducted an election in this unit; of the approximately 55 eligible voters, 36 voted to have the Intervenor represent them for purposes of collective bargaining.

On April 26, the Petitioner filed a petition seeking to represent a portion of the recognized unit.[2] In its petition, the Petitioner also stated that it was prepared to represent an alternative unit found appropriate by the Board. See *Overnite Transportation Co.*, 331 NLRB 662, 663 (2000) ("[I]f [a] petitioned-for unit is not appropriate, the Board may examine the alternative units suggested by the parties, and also has discretion to select an appropriate unit that is different from the alternative proposals of the parties"). Although the Regional Director found that the petitioned-for unit was not an appropriate unit, he found that a drivers-only unit consisting of approximately eight employees was appropriate. I agree with these findings.

Applying *Smith's Food & Drug Centers*, 320 NLRB 844 (1996) and *American National Can, Inc.*, 321 NLRB 1164 (1996), the Regional Director found that the recognition agreement between the Intervenor and the Employer did not bar the Petitioner's petition because the Petitioner had obtained the support of, inter alia, 30 percent of the drivers at the time the Intervenor and the Employer entered into the recognition agreement. My colleagues contend that the Regional Director incorrectly extended the holdings of *Smith's Food & Drug Centers* and *American National Can*. I disagree.

In *Smith's Food & Drug Centers*, 320 NLRB at 846, the Board held that

> in rival union organizing situations, a voluntary and good-faith recognition of a union by the employer based on an unassisted and uncoerced showing of interest from a majority of unit employees will bar a petition by a competing union, unless the petitioner demonstrates a 30-percent showing of interest that predates the recognition. Where such interest is shown, an election is warranted in order to guarantee employees an opportunity to express their desires in a definitive way.

In *American National Can*, 321 NLRB at 1164, the Board applied this rule to a situation involving a voluntarily-recognized unit of 397 employees and a petitioned-for unit of approximately 24 employees. Given that the Petitioner had secured the necessary 30 percent showing of interest prior to the employer's voluntary recognition of the intervenor, the Board found that the recognition bar did not apply. Id. And, the fact that the petitioner sought a significantly smaller unit did not affect this analysis. Id.; see also *Smith's Food & Drug Centers*, 320 NLRB at 844 (petitioning unions sought to represent units that were substantially smaller than the recognized unit).

In reversing the Regional Director's refusal to apply the recognition bar to the Petitioner's petition, my colleagues contend that the exception to the recognition bar rule developed in *Smith's Food & Drug Centers* (and refined in *American National Can*) does not apply to circumstances involving a petition for a unit that is not appropriate. My colleagues offer no rationale for why they have created this "exception" to the recognition bar exception beyond their vague and speculative assertion that it will prevent instability and uncertainty regarding voluntarily recognized units.

My colleagues also ignore the fact that the Regional Director, *consistent with well-established Board law and policy*, considered an alternative unit (derived from the petitioned-for unit), and found such a unit to be appropriate. See *Overnite Transportation Co.*, 331 NLRB at 663. My colleagues offer no reason for why they have chosen, here, to ignore a Regional Director's customary exercise of discretion in determining an appropriate unit. Indeed, my colleagues have utterly failed to explain why a petitioned-for unit in this context would be appropriate, but a unit *derived* from the petitioned-for unit pursuant to longstanding Board law and policy would not. In sum, today's change unduly burdens petitioners, adversely affects employee free choice, and upsets settled precedent without supplying any logical basis for doing so.

Thus, I would adopt the Regional Director's Decision, process the Petitioner's petition, and direct an election.

Dated, Washington, D.C. September 30, 2002

William B. Cowen, Member

NATIONAL LABOR RELATIONS BOARD

[2] The petitioned-for unit, which includes approximately 21 employees, is:

> all drivers, warehouse assistants, warehouse drivers/helpers, yard foremen, gate checkers, warehouse foremen and forklift operators, excluding roof truss leadman, roof truss stacker, truss plant production foremen, truss assemblers, wall paneler sawyer, wall panel component assembly leadman, wall panel plant production foreman, wall panel component assembler, component sawyer, office clerical employees, security guards and other employees by operation of the National Labor Relations Act.

The petitioner had the support of 30-percent of this unit when the Employer recognized the Intervenor.

APPENDIX

Upon the entire record in this proceeding, the undersigned finds

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that Triangle Building Products Corp., herein called the Employer, a New York corporation, with its principle office and place of business located at 2599 Route 112, Medford, New York, (the Medford facility), is engaged in the retail sale of lumber, cabinets, and related building products. During the past year, which period represents its annual operations generally, the Employer derived gross annual revenues in excess of $500,000 and purchased and received at its Medford facility, goods, supplies, and materials valued in excess of $5000 directly from points located outside the State of New York.

Based on the foregoing, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations involved herein claim to represent certain employees of the Employer.

4. It appears from the record that on March 26, 2001, an independent arbitrator conducted an "election" among 55 employees of the Employer. According to the "certification of results" of the arbitrator (dated March 26), 36 employees voted for the Intervenor.[1] The Intervenor and the Employer agreed that the unit included all full-time and regular part-time drivers, carpenters, checkers, warehousemen, assemblers, forklift operators, and "related" employees, excluding professional employees, guards, and supervisors.[2] Sometime prior to the March 26th "election," the Employer had been presented with 30 cards from the Intervenor and checked those cards against W-4 signatures. On March 21, 2001, the Employer executed a "card count stipulation" indicating that it reviewed the cards, the signatures, and the W-4 forms and found that the Intervenor had majority status.[3] Apparently, based on the card check that preceded the "election" held by the arbitrator, the Employer and the Intervenor executed a recognition agreement dated March 21, 2001, designating the Intervenor as the collective bargaining representative of all "production and maintenance employees, carpenters, material handlers, warehousemen, forklift operators, truck drivers and checkers, excluding office clerical employees, guards and supervisors."[4] The Employer and the Intervenor both assert that their recognition agreement bars the processing of the instant petition. In support of their positions, both parties cite *Smith's Food & Drug Centers*, 320 NLRB 844 (1996). The Petitioner generally contends that the recognition agreement should not operate as a bar and that the facts of this case are distinguishable from *Smith's Foods* and more consistent with *American National Can, Inc.*, 321 NLRB 1164 (1996).

Smith's Food essentially stands for the proposition that, despite the existence of active and simultaneous campaigns by two competing unions, "a voluntary and good faith recognition of a union by the employer based on an unassisted and uncoerced showing of interest from a majority of unit employees, will bar a petition by a competing union, unless the petitioner demonstrates a 30 percent showing of interest that predates the recognition." The Board in *Smith's* dismissed the petitions involved therein because neither of the petitioning labor organizations had secured the requisite 30 percent showing prior to the employer's recognition of the intervenor. Here, the Intervenor and the Employer essentially argue that, under *Smith's*, in order to circumvent a recognition bar, the Petitioner must show that it had a 30 percent showing of interest in the *recognized unit*. It is undisputed that the Petitioner did not have that showing. Instead, it has a sufficient showing of interest in the *petitioned-for* unit only, which is substantially smaller than the recognized unit.[5]

In *American National Can*, the facts surrounding the recognition are similar to the facts here. The employer recognized the intervening union in a unit that was substantially larger than the petitioned-for unit, and it was undisputed that the petitioner did not have a 30 percent showing in the larger recognized unit. However, all parties to that proceeding admitted that the petitioned-for unit constituted a separate but smaller appropriate unit. And, the petitioner therein secured the requisite 30 percent showing of interest in the petitioned-for smaller unit prior to the voluntary recognition of the intervenor. In those circumstances, the Board did not accord the recognition bar quality.

From my reading of *American National Can*, it appears that the recognition bar issue cannot be resolved until the appropriateness of the petitioned-for unit is resolved. Accordingly, the motion to dismiss on this ground will be addressed more fully below, after the analysis of the unit issue.

5. The Petitioner seeks to represent drivers, warehouse assistants, warehouse driver/helper, yard foremen,[6] gate checkers, warehouse foremen, and forklift operators, excluding roof truss leadman, roof truss stacker, truss plant production foremen, truss assemblers, wall paneler sawyer, wall panel component assembly leadman, wall panel assembler, wall panel assembly leadman, wall panel plant line leader, wall panel plant-

[1] Board Exh. 4.
[2] Board Exh. 3.
[3] Intervenor Exhs. 1A and 1B.
[4] Intervenor Exh. 1C.

[5] The recognized unit consists of about 55 employees and the petitioned-for unit includes approximately 21 employees (8 drivers, 8 forklift operators, 1 warehouse foreman, 2 yard foremen, and 1 gate checker).

[6] The parties stipulated that all foremen are NOT statutory supervisors within the meaning of Sec. 2(11) of the Act (Tr. 102). Thus, it appears that all parties agree that any employee classified as a foreman is eligible to vote. Despite this stipulation, the Petitioner, on p. 12 of its brief, claims that the "yard foreman job description . . . describes a job as largely supervisory, uses the word supervision several times and describes the yard foreman as a supervisor." Yet, on p. 13 of the brief, the Petitioner claims that yard foremen share a community of interest with drivers and forklift operators and constitute an appropriate unit. I am uncertain of the Petitioner's contention regarding the yard foremen. However, it is clear from the record that the Petitioner did not take the position that this classification is supervisory and the matter was not fully litigated. Nor am I certain, based on the ambiguous language in the brief, whether the Petitioner *currently* takes the position now that this classification is supervisory. Thus, I presume that no party posits that the foremen are supervisory and I will hold the Petitioner to its stipulation that all foremen, including the yard foremen, are not 2(11) supervisors.

production foremen, wall panel component assemble, component sawyer, office clerical employees, guards and supervisors. Both the Intervenor and the Employer claim that a wall-to-wall unit of production and maintenance employees, the recognized unit, is appropriate, and that the petitioned-for unit is inappropriate. In this regard, both parties assert that because of the Petitioner's participation in a prior representation petition seeking a larger unit, the only appropriate unit herein must be coextensive with the stipulation in the prior case. I disagree.

The record reflects that on March 31, 2000, a stipulated election agreement was entered into in Case 29–RC–9445, where the Petitioner and the Employer agreed that the appropriate unit included forklift operators, drivers, yard help in the truss department, wall panel department, mill department, lumber department, carpenters and woodworkers, excluding all other employees.[7] It is based on that stipulated election agreement that the Employer and the Intervenor argue that the petitioned-for unit is inappropriate.[8] Despite the parties' position in this regard, the Board has long held that the appropriateness of a particular unit that has *not* been litigated in a Board proceeding is not given any weight in subsequent proceedings where the unit issues are fully litigated. *Coca-Cola Bottling*, 156 NLRB 450, 452 (1965); *Bowman Transportation, Inc*., 166 NLRB 982, 983 (1967); and *Vangas, Inc*., 167 NLRB 805, 806 (1967). Thus, certifications and unit findings that resulted from stipulations of the parties are not binding on the Board and the appropriateness of the stipulated unit is not considered a "Board pronouncement on the merits of the unit sought." *Coca-Cola*, supra. Accordingly, I reject the Employer's and Intervenor's argument that the petitioned-for unit is inappropriate based on the Petitioner's execution of a stipulated election agreement in a larger unit and find that the stipulation does not warrant a finding that the petitioned-for unit is inappropriate. Instead, the appropriateness of the petitioned-for unit shall be based on the record evidence.

Two witnesses testified regarding the unit issue, driver Al Salvatore, and the Employer's director of operations, Nicholas Cardaci.

The Employer's president is Bruce Meltzer. The chief financial officer is Bruce Latham who reports to Meltzer. Cardaci, the director of operations, reports directly to Meltzer as does Tom (LNU), the vice president, and the administration manager. The general manager is John Sabean, who reports to the vice president. There is one human resource manager, Jessi Williamson, who reports to Latham. There are two managers, Mike Bazoge and Michael McManus, whose responsibilities are outlined more fully below.[9]

With respect to the layout of the Employer's facility, upon entering the Employer's driveway, there is a building on the right side of the property.[10] This building is known as the roof and floor truss assembly plant. That building houses truss assemblers who assemble the roof trusses. There are about six truss assemblers.[11] There are also two roof truss stackers who take the completed trusses and stack them onto a forklift. There are four unnamed roof truss leadmen who oversee the operations on a truss table where the trusses are assembled. Generally, there is one forklift operator that works in the truss plant and he lifts the plates for building the trusses.[12] The truss plant also has a saw located at the end of the plant, where wood is delivered by a forklift operator. The wood is cut by the truss plant sawyer. The truss plant foreman is Tony Ceglowski.[13] All employees employed in the truss plant are supervised by Mike Bazoge.

On the left side of the Employer's facility, opposite the truss plant, is the main office. Adjacent to the office is the wall panel plant. The wall panel plant assembles prefabricated walls. There are six wall panel assemblers who assemble the walls.[14] There are two wall panel component assembly leadmen who assemble the materials used for the actual wall panel. There are two wall panel sawyers[15] who saw materials in the wall panel plant. The sawyers can work in both the wall panel and truss plants cutting lumber in either place. In addition there are seven wall panel assembly lead men.[16] Finally, there are two wall panel production foreman, George Dierlam and Mike Scevola, who work in the truss plant on occasion. The wall panel plant employees are also supervised by Bazoge. The truss and wall panel plants together employ a total of 45 employees.

Adjacent to the wall panel plant there is a lumber shed, in which lumber, nails, building materials, plywood and sheet rock are stored. There are no particular employees that are assigned to that location. Rather, if an employee from the other plant locations require materials from that area, they can access it themselves.

There is also a window warehouse and a cabinet warehouse, in which windows, doors, cabinets, hardware, locks and moldings are housed. A loading dock separates the window and cabinet warehouses. At the moment, there is one warehouse foreman, Bittner, who is responsible for the overall mainte-

[7] See Board Exh. 7.

[8] The record reflects that in 1996, an election was held pursuant to an Employer-filed petition in Case No. 29–RM–859. However, the Petitioner herein was not party to that stipulated election agreement. Instead, the only union involved there was Long Island Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners. No other labor organization expressed an interest in that case. See Board Exh. 8.

[9] For an organizational chart, see Intervenor's Exh. 3.

[10] See Intervenor's Exh. 2 for a rough layout of the Employer's facility.

[11] Initially, Cardaci testified that there are 12 truss assemblers (Tr.133). However, later on in his testimony, he indicated that there are six truss assemblers and six wall paneone assemblers (Tr. 135).

[12] According to Cardaci, there is no particular employee that is assigned to operate the forklift in the truss plant. Rather, any employee can operate the forklift, provided they have the appropriate certification to do so.

[13] According to Cardaci, there used to be two truss plant foremen and now there is only one.

[14] The six assemblers in the truss plant and the six assemblers in wall panel plant have the ability to work in either plant location.

[15] Initially, Cardaci testified that there are two sawyers (Tr. 134) but later on he testified that there is only one full time component sawyer (Tr. 142).

[16] Cardaci testified that the Employer employs a total of 12 or 13 leadmen in various different plants. From the record, it appears that there are four roof truss leadmen, two wall panel component assembly leadmen and seven wall panel assembly leadmen.

nance and control of the warehouse.[17] According to Cardaci, there are two warehouse drivers, who have commercial driver licenses and whose responsibility it is to drive cabinets and windows to customers at jobsites. The warehouse drivers report to the warehouse foreman, Bittner, who reports to McManus.[18]

In the center of the facility is the yard. There are two yard foremen, Jim Lynch and Doug Moore, who report to McManus, the supervisor of the yard and the cabinet and window warehouses.

The Employer employs approximately eight drivers who drive to construction sites to deliver building materials. All drivers have commercial driver licenses. These drivers operate any one of a number of the following kinds of trucks: tractor trailer trucks for delivery of roof trusses and wall panels; box trucks for delivery of windows, doors and other materials; and lumber trucks for delivery of lumber.[19] Tractor-trailers are loaded in the front of the facility; the lumber and box trucks are loaded in the back of the facility. There are two or three drivers who regularly drive the tractor-trailers, four employees who drive the lumber trucks and an unknown number of employees who drive the box trucks. As indicated above, there appear to be two warehouse drivers who deliver cabinets and windows to customers and it appears that they drive the box trucks. They report to McManus (through the warehouse foreman, Bittner). The other drivers also report to McManus, through the yard foremen, Moore and Lynch,[20] except for the two tractor-trailer drivers, who deliver roof trusses, and who are supervised by Bazoge. (Tr. 105). Generally, the drivers are on the road for most of the day. Salvatore, a driver, claims that he is present at the Employer's facility for 15 hours per week. According to Salvatore, only the tractor-trailer drivers, boom truck drivers, spider and flatbed truckdrivers return to the facility during the day to reload. The drivers wear a uniform of tan or black pants along with the Employer's tee-shirt and hat and they receive an allowance for footwear. All other employees are not required to wear any uniform. Cardaci claims that 3 or 4 days a week, the drivers are accompanied by helpers, particularly with box truck deliveries, and these helpers generally are assemblers from the wall panel or truss plants.[21]

According to Cardaci, the Employer employs a total of eight forklift operators[22] who assist in loading and unloading trucks and also assist in loading and unloading material that comes out of the truss and wall panel plants and the warehouse (Tr. 139–140). The forklift operators also move items within the wall panel and truss plants. Four of the forklift operators are stationed in the lumber area and they load and unload lumber from the trucks. The remaining forklift operators are stationed in the truss plant area and they load trusses from the plant area. In addition, there are three or four assemblers within the truss or wall panel plants who operate forklifts inside the plants. The forklift operators receive safety courses and are certified to operate the forklifts. According to Salvatore, the forklift operators assist in loading trucks as do the warehouse employees (Tr. 43). The forklift operators who work solely in the lumber yard are supervised by McManus and those working the truss and wall panel plants are supervised by Bazoge.[23]

With respect to the flow of materials in and out of the Employer's facility, it appears from the record that when materials arrive at the Employer's facility and require unloading, the Employer pulls employees from various segments of its operation to perform that task. In this regard, the Employer takes any available assemblers or forklift operators to unload incoming vehicles. There is no specific set of employees that is responsible for this job. As for manufacturing of the truss and wall panels, Bazoge prepares a production schedule based on a particular customer's needs and the dates that the customers require delivery. The production schedule is posted on the wall of the office, where a forklift operator retrieves it. The forklift operator retrieves lumber from the lumber yard/shed, where nails, building materials, plywood and sheetrock are stored[24] and delivers the lumber to the sawyer located in the truss plant.[25] The sawyer signs a document indicating receipt of the lumber supplies and proceeds to cut the wood in accordance with the production requirements.[26] After the trusses are completed, there are stackers in the truss plant that bundle the finished roof trusses. The forklift operators lift the material from the plant and place it in the yard, where it awaits shipment. Then, the truss plant foreman informs the drivers' foreman, Doug Moore, that the truss package is ready for removal from the plant. Either Doug Moore or one of the forklift operators load the trusses onto a truck and the driver is advised of the delivery schedule.

[17] Although there is a job classification called warehouse assistant, whom the Petitioner seeks to include, Cardaci testified that no one occupies that position at the moment.

[18] Petitioner Exh. 2c.

[19] There are three kinds of lumber trucks: a boom truck that has a crane, two spider trucks that have a forklift mounted on the back, and one flatbed truck. According to Cardaci, there may be one truck driver, who drives a box truck, who does not possess a commercial driver license.

[20] Petitioner Exh. 2a.

[21] Salvatore confirmed that assemblers have been helpers on box trucks, although he claims that this does not occur very often (Tr. 47).

[22] Salvatore claimed that the Employer employs 6 forklift operators. Inasmuch as Cardaci is the director of operations, it is likely that he is more familiar with the number of employees in each classification than is Salvatore.

[23] There was some testimony during the hearing that the assemblers wear a tool belt and carry a hammer, while the forklift operators and drivers do not. The Petitioner, in its brief, claims that "the fact that the petitioned-for employees do not use these tools further proves the different job functions performed." Although the Petitioner places emphasis on this issue, I am of the view that the tools carried, or not carried, by a particular group of employees is not crucial to a determination of the appropriateness of the unit.

[24] Most of the materials stored in the lumber shed are used by the wall panel plant operation, but, according to Cardaci, at any time, an assembler in either the wall panel or truss plants, or a warehouse employee, can access that area himself and retrieve the materials needed.

[25] On occasion, a forklift operator will retrieve lumber that does not precisely track the production order. If this occurs, the forklift operator explains to the truss plant sawyer that he has substituted a particular item with another due to unavailability.

[26] Salvatore testified that it is "not very often" where a forklift operator drives into the truss plant. In this regard, Salvatore claims that a forklift operator can deliver lumber to the sawyer without even entering the facility because the saw is located right inside of the doorway entrance.

With respect to the movement of materials in the wall panel plant, most of the materials used there are precut. Depending on the material needed, the foremen in the wall panel plant, Scevola or Dierlam, send the forklift operator to the lumberyard to pull the items needed. The forklift operator leaves the materials at the loading dock of the wall panel plant and either foreman signs a receipt for the materials delivered.[27] After the production of the wall panel is complete, it is placed on rollers and rolled out of the plant by assemblers. The forklift operators are asked by the yard foremen to remove the wall panel material from the rollers and place it in the yard where it awaits shipment. When it is ready to be shipped, the forklift operators place the wall panels onto the truck.

There is a cabinet and window warehouse where doors, windows, moldings, trim, and locks are stored. It appears that the only warehouse employee is the warehouse foreman, Bittner, although there are two warehouse drivers who drive box trucks and deliver the materials stored in the warehouse to the respective construction sites. The forklift operators remove warehouse material and place it onto a truck for delivery. Cardaci's testimony implies that assemblers from the truss or wall panel plants can also be called upon to help load warehouse materials onto trucks.

When a shipment is ready to be delivered, the trucks are loaded by forklift operators although it appears that other employees assist in the loading, which is discussed more fully below. When the driver is ready to leave the facility, he must pass through a gate checker who is stationed at the front of the facility. The gate checker is responsible for checking the deliveries that enter and exit the Employer's facility. He checks the invoices and logs the invoiced material on a chart. He also indicates the driver's destination point and the time the driver left the facility. Upon a driver's return to the facility, his delivery paperwork is turned into the gate checker. There is only one gate checker. Because that employee only works until 5:00 p.m., no deliveries leave the Employer's facility after that time.

As indicated above, the employees employed in the truss and wall panel plants are supervised by Mike Bazoge. The employees in the lumberyard and warehouse are supervised by Mike McManus. The gate checker is the only employee who reports directly to Cardaci.[28] All drivers are supervised by McManus, except for the tractor-trailer drivers who are supervised by Bazoge.

It appears from the record that the drivers, forklift operators and warehouse employees have more customer contact than employees who work in the truss or wall panel plants. In this regard, a customer can pick up a cabinet, window or door in the warehouse area where they encounter warehouse employees, or a customer may pick up lumber in the yard where they encounter forklift operators. Drivers have customer contact while on a jobsite.[29]

Salvatore claims that he and other drivers have no contact with truss plant employees or with wall panel employees. Salvatore admits that forklift operators have "little contact" with truss and wall panel employees, mostly when the finished product must be removed from those respective plants (Tr. 43). Cardaci confirms that forklift operators have contact with assembly employees in the truss and wall panel plants, but his testimony implies that the contact is more frequent. In this regard, as noted above, he contends that when material is needed in either plant, a requisition form is prepared and given to the forklift operator who pulls the material needed either from the lumber yard or the warehouse and brings it to the wall panel or truss plants. In addition, a forklift operator that is stationed within the truss and wall panel plant can retrieve materials from the door and bring it inside the plant. As for the warehouse employees, of which there appears to be only one (the foreman), Salvatore claims that said employee has no contact at all with truss and wall panel plant employees.

The Employer's basic shift times for all of its employees commences at 6 a.m. and ends at 2:30 p.m. The Employer has a second shift, from 2:30 to 11 p.m. However, this shift is only applicable to the truss and wall panel plant employees. According to Cardaci, there are four assemblers who work on the nightshift, as do three leadmen. Cardaci testified that six forklift operators work the dayshift and the remaining two forklift operators work the nightshift.

With respect to interchange among employees in the disputed classifications, Salvatore claims that drivers, forklift operators, and warehouse employees do not perform any work in the truss or wall panel plants. Cardaci testified to the contrary. In this regard, Cardaci claims that somewhere between 1 to 3 times per week, the forklift operators perform assembly work if production requires such assistance (Tr. 157–158). Cardaci also claims that, for the most part, this happens on an overtime basis, i.e., forklift operators do not perform assembly work during the week, but only on an overtime basis when it is needed (Tr. 237, 265). There are only two or three forklift operators that have experience as assemblers and can perform that function (Tr. 237). Cardaci also claims that drivers have worked as assemblers in the wall panel and truss plants, but no specific examples were given (Tr. 159).[30] However, Salvatore named one driver, Salley, who has, in the past, assisted in assembly of trusses in the truss plant (Tr. 54).[31] Salvatore did admit that, on occasion, in order to meet production requirements, drivers work overtime shifts in the truss and wall panel plants, but this has not occurred in the last 1-1/2 or 2 years (Tr. 72–73). Although Salvatore's testimony implies that the truss and wall panel assemblers do not have the appropriate certification for operation of a forklift, Cardaci testified that there are three assemblers who are forklift certified and operate that equipment inside the plants (Tr. 155). On an infrequent basis, a

[27] Contrary to Cardaci's testimony, Salvatore claims that it is "not possible" for forklift operators to drive the forklift into the wall panel plant because there is insufficient room for it to enter.

[28] About 2 weeks prior to the hearing, the Employer created a new position of dispatcher. It appears that the Petitioner does not seek to include this position in the unit.

[29] In its brief, the Petitioner places emphasis on this factor in support of its contention that the petitioned-for unit is appropriate.

[30] Cardaci also testified that when the winter season approaches and deliveries slow down a bit, the Employer offers drivers the opportunity to work inside the production plants. (Tr. 259). However, Cardaci claims that drivers are not required to perform production work, and, no specific examples were given as to which drivers have actually opted to work in the production plant in the recent past.

[31] Salvatore named one forklift operator, Davis, who also performed assembly work.

truss assembly employee can operate as a helper on a box truck to assist in loading and unloading the truck (Tr. 47), or any other trucks coming into the Employer's facility (Tr. 163).[32] The truss and wall panel plant assemblers can assist the forklift operators in loading and unloading trucks and, according to Cardaci, when the Employer receives a shipment of cabinets on a large tractor-trailer, the assemblers, forklift operators and/or the warehouse foreman can assist in unloading the merchandise (Tr. 163, 180–181). The same is the case if the Employer receives a shipment: any one of the Employer's employees, including assemblers or sawyers, can assist in unloading a truck (Tr. 163, 180–181).[33] According to Cardaci, this kind of assistance in unloading trucks can occur 1 or 2 times per week for a large tractor-trailer. In the same vain, 40 percent of the time, the unloading of a truck requires assistance from truss or wall panel plant assemblers (Tr. 181). If an assembler, who generally works for Bazoge, is assigned to load or unload a truck, he is supervised temporarily by McManus, who supervisors the warehouse and yard operations. The warehouse foreman, Bittner, has worked overtime as an assembler (Tr. 265).

With respect to permanent transfers, Salvatore claims that drivers and forklift operators have never transferred to the truss plant, but he admits that one truss employee, Glassner, became a driver after having obtained a commercial driver's license (Tr. 47, 59, 72). According to Cardaci, a wall panel assembly employee, Lenny Rodriquez, became a warehouse assistant in the window portion of the warehouse about 2 years ago. In addition, Kenny Williamson, a night foreman in the wall panel shop became a forklift operator (Tr. 224).[34] Tim Murphy was hired as a truss assembler, became a truss foreman, a wall panel leadman, a yard foreman, and a forklift operator. Doug Moore, the current yard foreman, was once a forklift operator. Eric Bowen, an assembler, became a forklift operator. Even Salvatore admits that he was hired as a forklift operator, then was transferred for a few months to the truss plant where he worked on the night shift performing assembly work. Thereafter, he reverted to a forklift operator in the lumberyard area and eventually became a truck driver (Tr. 53–54, 64, 70).

With respect to the wage rates of the disputed classifications, the truck drivers (including tractor trailer drivers) and the forklift operators earn between $16.25 and $19.25 per hour. There are two non-CDL drivers, who earn between $15.06 and $17.06 per hour. The gate checker earns between $8.40 and $10.40 per hour. The truss and wall panel assemblers earn between $9.45 and $11.45 per hour. The sawyers earn between $13.92 and $15.92 per hour. The foremen earn between $15.92 and $18.02 per hour.[35]

With respect to benefits, all of the employees employed by the Employer are subject to the same vacation, holidays, sick leave, and personal day policies. The medical benefits are available to all of the Employer's employees who wish to contribute to it. The Employer's disciplinary policy as outlined in its handbook is applicable to all employees.[36] The Employer has some safety rules that, according to Cardaci, are signed by all employees and that apply to all of the Employer's employees. The Employer has two breakrooms that are used for lunch by all employees except for the drivers who take their lunch while on the road.

It is well established that a certifiable unit need only be an appropriate unit, not the most appropriate unit. *Morand Bros. Beverage*, 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); *Omni International Hotel of Detroit*, 283 NLRB 475 (1987); *P. J. Dick Contracting*, 290 NLRB 150 (1988); and *Dezcon, Inc.*, 295 NLRB 109 (1989). The Board's task, therefore, is to determine whether the petitioned-for unit is an appropriate unit, even though it may not be the only appropriate unit or the ultimate unit. In making unit determinations, the Board first looks to the unit sought by the petitioner. If it is appropriate, the inquiry ends and the Board does not evaluate any competing unit contentions. If, however, the unit is inappropriate, the Board will scrutinize the employer's proposal. *Dezcon, Inc.*, supra at 111. Also see *Overnite Transportation*, 325 NLRB 612 (1998). In assessing the appropriateness of any proposed unit, the Board considers community of interest factors such as employee skills and functions, degree of functional integration, interchangeability and contact among employees, and whether the employees have common supervision, work sites, and other terms and conditions of employment.

Bearing these principles in mind, I find that the petitioned-for unit of drivers, warehouse drivers/helpers, warehouse foremen, yard foremen, gate checker and forklift operators to be inappropriate.[37] The three most compelling factors in finding this unit to be inappropriate are: (1) the work related contact between the petitioned-for employees and the excluded classifications; (2) the functional integration of the Employer's operations particularly among the employees that remain at the Employer's facility during the course of the day; and (3) the degree of interchange between the petitioned-for unit and the classifications the Petitioner seeks to exclude.

It is undisputed that the drivers spend large portions of their day away from the Employer's facility, while the remaining employees, including forklift operators, the warehouse foreman, the yard foremen, and the gate checker, remain at the facility. It appears that there is frequent work-related contact and a degree of functional integration between the forklift operators and the assemblers in the truss and wall panel plants. For instance, the forklift operators retrieve materials for the wall panel and truss plants, deliver the materials to those loca-

[32] Salvatore concedes that the drivers are present when the forklift operators load their trucks but contends, contrary to Cardaci, that assemblers load trucks of any kind.

[33] In general, Salvatore claims that assemblers never assist in loading or unloading trucks. On the other hand, Cardaci claims that because the Employer does not have specific employees whose responsibilities solely include loading or unloading, any employee may be called upon to do so.

[34] Contrary to Cardaci's testimony, Salvatore claims that there have been no truss or wall panel plant employees who have become forklift operators.

[35] Petitioner's Exh. 1.

[36] It appears from the record that the Employer maintains an employee manual that is undergoing some revision. This manual (Petitioner Exh. 6) is maintained in the Employer's human resource office and all of the provisions therein apply to all of the Employer's employees.

[37] Although the petitioned-for unit seeks warehouse assistants, it appears from the record that there are no employees that occupy that classification.

tions, and have daily contact with the sawyers and the assemblers inside those plants. After the production of the wall panels and trusses are complete, the forklift operators move them from the respective plants into the yard, upon the direction of the yard foremen, all of whom remain at the facility all day. The yard foremen also deal directly with the forklift operators in moving materials around the yard. The forklift operators, and if need be, assemblers in the truss and wall panel plants, retrieve materials needed from the window or cabinet warehouse, where there is only one employee, a warehouse foreman, who remains on-site during the day. Shipments are loaded on trucks by forklift operators, assemblers, the warehouse foreman and, if need be, any employee that is available to assist. All shipments are checked by the gate checker before the trucks enter the facility and when drivers leave the facility with the Employer's product. Similarly, forklift operators, assemblers, and warehouse employees unload shipments when they arrive at the Employer's facility. Thus, in my view, the job duties and responsibilities of the forklift operators, warehouse foreman, yard foremen and gate checker are functionally integrated, they have regular and daily contact with one another, and share a sufficient community of interest with the production employees to conclude that the classifications sought cannot appropriately constitute their own unit.

I also note that there is a large degree of temporary interchange among petitioned-for classifications with those whom the Petitioner seeks to exclude. In this regard, there are two or three forklift operators who have the capacity to perform assembly work and do so one to three times per week on an overtime basis. There are some assemblers who have the requisite certification and operate forklifts inside the production plants. Although there was some testimony that drivers, in the past, assisted in assembly work, Cardaci was unable to provide specific examples and Salvatore claims that it has not occurred in at least a year and a half. Moreover, I note that the drivers are not permanently stationed at the Employer's location, thus, it is less likely that they would temporarily be assigned assembly work, or other production related work, based on their time away from the Employer's location.

Although the Board generally places greater emphasis on temporary rather than permanent transfers, the record establishes that there are a number of production employees, i.e., assemblers, that have become forklift operators or warehouse employees, and visa-versa. In this regard, employees Rodriquez, Williamson and Bowen, employees in either the wall panel or truss plants, became forklift operators, warehouse employees, or yard foremen. One can become a driver only if a commercial drivers' license is obtained, and this happened on one occasion. Thus, it appears more likely that employees will move from the production plants to positions as forklift operators, warehousemen, or yard employees because special driving skills are not required.

In its brief, the Petitioner argues that the petitioned-for unit is appropriate for a number of reasons, each of which I reject. First, the Petitioner contends that the unit sought is primarily engaged in transportation of the Employer's product while the employees it seeks to exclude are primarily engaged in production of the Employer's product. Contrary to the Petitioner's contention in this regard, the record does not support the Petitioner's conclusion in this regard. Although the Petitioner claims that the petitioned-for unit is engaged in the transportation of the Employer's product, the record established that the drivers are the *only* employees that bear the responsibility to deliver the product to the customer. Certainly, the forklift operators, the warehouse foreman, the yard foremen and the gate checker have a hand in the transportation process by assisting in loading the truck and checking the trucks before they leave the facility. However, at best, they initiate the transportation process by preparing the materials for shipping, loading the materials onto the trucks and logging the invoices upon exit from the facility. Once the shipments leave the Employer's facility, these employees have other daily responsibilities: the forklift operators move materials directly to and from the production plants and the warehouse; the warehouse foreman is solely responsible for maintaining inventory there; the yard foremen maintain the yard, prepare products for shipping and move products from the plant to the yard; and the gate checker logs all the traffic in and out of the yard. Thus, while the transportation process originates with these employees, they have other duties during the day that establish their community of interest with the production operation and not the drivers.[38]

The Petitioner also argues that the petitioned-for employees require specialized certifications compared with those the Petitioner seeks to exclude. While it is true that the drivers require commercial drivers' licenses, and that the forklift operators require certification, the yard foremen, the gate checker and the warehouse foreman do not require these licenses or certifications. Accordingly, I reject the Petitioner's argument in this regard.[39]

The Petitioner also argues that the petitioned-for unit employees are compensated at a greater hourly rate than those that it seeks to exclude from the unit. However, the Board has held that a distinction in the rate of pay does not necessarily affect unit determinations. See *Four Winds Services*, 325 NLRB 632 (1998), where the Board held that differences in compensation rates do not destroy a community of interest among employees and would not require that they be in separate units. Moreover, I note that some of the foremen sought in the petitioned-for unit earn the same wage rates as those in the production plant,

[38] In its brief, the Petitioner also claims that the Employer structured its business in such a way that the production departments and the transportation departments are separate. Thus, the Petitioner argues that a separate unit of 'transportation-related' employees would be appropriate. However, as noted above, the petitioned-for unit does not merely constitute 'transportation' employees. There are other employees who perform other work during the day. It is true that the Board is cognizant of the "administrative set-up" of the employer's operations and that the manner in which a plant is structured has a "direct bearing on the community of interest among various groups of employees." See *International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951). However, in the final analysis, the manner in which an employer has administratively structured its operations must be analyzed in conjunction with an examination of how employees interact so as to carry out the employer's business purpose. *Gustave Fisher, Inc.*, 256 NLRB 1069 (1981).

[39] I also note that the Employer has two or three assemblers who are forklift certified, yet the Petitioner seeks to exclude them even though they, like some of the petitioned-for employees, have similar certification.

whom the Petitioner seeks to exclude. Also, some of the sawyers (whom the Petitioner seeks to exclude) earn more than the gate checker (included in the unit sought) and some sawyers may even have similar wage rates as the drivers. Thus, the record does not support the notion that the petitioned-for employees are uniformly compensated at a higher hourly rate than the production employees whom the Petitioner seeks to exclude. In addition, the Petitioner claims that the petitioned-for employees receive better benefits because they are the Employer's most senior employees. Thus, the Petitioner claims that they are eligible for more vacation time, sick leave, and personal days due to their length of service. However, the mere fact that employees' seniority affords them additional time off does not establish that the two groups receive completely different benefits. The Petitioner also claims that the production employees have a second shift and that the petitioned-for employees generally work only on the first shift. Even assuming that the two groups of employees work separate shifts, this factor, in and of itself, is not a basis for carving out a separate unit for the petitioned-for employees, particularly where there is some evidence that the warehouse foreman and forklift operators have worked on the second shift (i.e., on an overtime basis) as assemblers.[40]

Finally, although the Petitioner argues that the petitioned-for employees have little or no contact with the employees that work in the Employer's production plants, the record does not support this conclusion. As noted above, there is a substantial amount of work related contact between the petitioned-for classifications and those the Petitioner seeks to exclude: forklift operators interact with truss and wall panel assemblers during delivery of materials and upon completion of production; the yard foremen direct the movement of the finished product from the production plants; and assemblers from the production plants and the warehouse foreman assist in loading and unloading trucks. Moreover, as noted above, there is a substantial amount of temporary interchange: the forklift operators can and do perform assembly work; some assemblers are forklift certified and perform that function inside the plant; and the warehouse foreman, on an overtime basis, has performed assembly work.[41] And, there is evidence that assemblers have made the transition from that classification to warehouse or yard employees. Thus, I reject the Petitioner's argument that there is little work related contact or an insignificant amount of interchange between the petitioned-for employees and those that it seeks to exclude.

Having found that the petitioned-for unit is inappropriate, I now turn to whether the wall-to-wall unit, as suggested by the Employer and Intervenor, is appropriate, or whether an alternative unit can also be appropriate. As noted above, once a petitioned-for unit is found to be inappropriate, the "Board may examine the alternative units suggested by the parties, and also has discretion to select an appropriate unit that is different from the alternate proposals of the parties. The Board generally attempts to select a unit that is the "smallest appropriate unit" encompassing the petitioned-for employee classifications." See *Overnite Transportation Co*., 331 NLRB 662 (2000). In *Acme Markets, Inc*., 328 NLRB 1208 (1999), the Board held that a Regional Director may consider alternative units where the petitioning union indicates a willingness to proceed to an election in any unit found appropriate. Inasmuch as the Petitioner herein has indicated a willingness to proceed to an election in any unit found to be appropriate, in my view, the smallest appropriate unit includes all of the Employer's drivers.

To be sure, a wall-to-wall unit, inclusive of all of the Employer's employees, can also be appropriate, as argued for by the Intervenor and the Employer. See *Marks Oxygen Co*., 147 NLRB 228, 230 (1964), where the Board held that a plant wide unit is presumptively appropriate. However, the Board has found that drivers may constitute an appropriate unit apart from warehouse and production employees unless they are so integrated with a larger unit that they have lost their separate identify. See *Overnite Transportation Co*., 322 NLRB 723 (1996); *Mc-Mor-Han Trucking*, 166 NLRB 700, 701 (1967); and *E. H. Koester Bakery, Co.*, 136 NLRB 1006, 1011 (1962). The Board has acknowledged that truck drivers often have a dual community of interest, with certain factors supporting their inclusion in the same unit as other plant employees and certain factors favoring their representation in a separate unit. See *Pacemaker Mobile Homes*, 194 NLRB 742, 743 (1971). They perform certain traditionally distinct functions (i.e., spending most of their time on the road driving, interacting with customers) which support their representation in a separate unit. *Mc-Mor-Han Trucking Co*., supra. At the same time, their work is closely integrated with the work of other employees at their employer's facility. This integration favors their inclusion in a more comprehensive unit. Where both a separate unit of drivers and a more inclusive unit are appropriate, the Board bases its unit determination on the wishes of the petitioning union. See *Pacemaker* supra, and *Mc-Mor-Han Trucking*. Here, it can be argued that both a wall-to-wall unit is appropriate (inclusive of drivers) and that a separate but smaller unit of drivers alone is also appropriate. I am mindful of the Board's view that it generally attempts to select a unit that is the "smallest appropriate unit" encompassing the petitioned-for employee classifications, and based on the record evidence as a whole, I conclude a separate unit of drivers constitutes an appropriate unit because they have a separate and distinct community of interest.

In general, drivers have been found to be so functionally integrated with plant employees as to preclude separate represen-

[40] In its brief, the Petitioner asserts that the production employees are subject to different rules and regulations, i.e., they have "component rules" requiring certain safety glasses, hammers, tape, knives and tool belts, whereas the forklift operators and truckdrivers have "safety rules and regulations," i.e., covering speed limitations, loading procedures, maintenance, and vision requirements. The Petitioner also argues that the drivers are required to wear the Employer's logo shirt. These factors, on their own, fall short of establishing that the petitioned-for employees share a distinct community of interest separate from the remainder of the Employer's employees, particularly where the Employer has an employee handbook, which is applicable to all of the Employer's employees.

[41] In its brief, the Petitioner claims that even assuming that the "transportation employees occasionally perform production work…the company's own job descriptions make no reference to employees performing work outside their job descriptions, so such work must not be significant." Br. at p. 10. Job descriptions are not dispositive in making unit determinations, and, the mere fact that a job description fails to mention that an employee may perform work outside of their classification does not mean that it does not occur.

tation where the drivers spend a substantial amount of time performing the same function as other employees at the terminals, some of whom performed driving duties, and where the drivers have the same supervision, pay scale and benefits as other employees. See *Standard Oil Co.*, 147 NLRB 1226 (1964) (where drivers were found to be appropriately included with other employees because they share similar terms and conditions of employment, they have the same supervision and they spend a substantial amount of time in the performance of the same functions as other employees, some of whom also perform driving duties); *Calco Plating*, 242 NLRB 1364 (1979) (where drivers were included in a unit of production and maintenance employees because the drivers spent a substantial amount of time working with production employees, they regularly perform production work, assist in pulling inventory, one driver occasionally engages in his former production job, and production and maintenance employees perform drivers' work by assisting in loading and unloading, making customer deliveries).[42] In *Overnite Transportation Co.*, 325 NLRB 612 (1998), the Board held that a separate unit of drivers constituted an appropriate unit, even though the employer there claimed that there was functional integration between the drivers and the mechanics, whom the employer sought to include. In that case, the employer argued that the integration included contact between drivers and mechanics when mechanics performed inspections, when drivers report vehicle concerns to the mechanics and when breakdowns occur on the road. The employer also argued that mechanics perform driving work when there is an emergency repair of vehicles. The Board concluded that despite all of the foregoing, a unit of drivers was an appropriate unit. Also see *Overnite Transportation Co.*, 322 NLRB 347 (1996), reconsidered in *Overnite Transportation Co.*, 322 NLRB 723 (1996), where the Board found a driver unit to be appropriate.

It is undisputed that the approximately eight drivers in question spend some amount of the time at the Employer's facility loading their trucks. At most, they return to the facility one time for reloading. Otherwise, they spend the remainder of their day delivering the Employer's product to customers. The amount of time the drivers spend at the Employer's facility and in contact with the Employer's other employees is limited. Although there is some evidence that drivers *can* work as assemblers in the Employer's truss or wall panel plants, there were no recent examples in the record to show they have. Moreover, it appears that no other employee may perform the work of a driver, particularly where a CDL is required to drive the Employer's trucks. There is evidence that the drivers are, in some sense, jointly supervised because the tractor trailer drivers are supervised by Bazoge and the remaining drivers are supervised by McManus. Although some of the drivers are supervised by McManus, who also supervises the forklift operators and other yard employees (including the yard foremen), the lack of specific separate supervision is insufficient to negate a finding that drivers constitute a separate appropriate unit. The Board, in *Overnite Transportation Co.*, 331 NLRB 662 (1999), specifically excluded drivers from a plant wide wall-to-wall unit partially because the drivers spent most of their day away from the employer's facility and there was little evidence that drivers performed work at the plant, or that plant employees performed driving work. In find the factual circumstances here to be similar.

Based on all of the foregoing, I find the following classifications to constitute an appropriate unit within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers[43] employed by the Employer at its 2599 Route 112, Medford, New York, facility, excluding warehouse assistants, yard foremen, gate checkers, warehouse foremen, forklift operators, roof truss leadman, roof truss stackers, truss plant production foremen, truss assemblers, wall paneler sawyers, wall panel component assembly leadmen, wall panel assemblers, wall panel assembly leadmen, wall panel plant line leaders, wall panel plant production foremen, wall panel component assemble, component sawyer, office clerical employees, guards and supervisors.

Motion to Dismiss

As indicated earlier in this Decision, both the Employer and the Intervenor moved to dismiss the instant petition on the grounds that the Petitioner did not have a 30 percent showing of interest in the recognized unit, a plantwide wall-to-wall unit, at the time when the Intervenor was recognized. It is undisputed that the Petitioner did not have a 30 percent showing of interest in the recognized unit at the time that recognition was extended to the Intervenor. In *Smith's Foods*, the petitioning unions sought units that were smaller than the recognized units but the petitioners did not have the requisite 30 percent showing even in those smaller units at the time of the recognition. Thus, the recognition was afforded bar quality. However, in *American*

[42] The Intervenor, in its brief, cites *Calco* in support of its claim that a plantwide unit, inclusive of the drivers is appropriate. However, I find this case factually distinguishable from the facts in *Calco* in two particular respects. First, in *Calco*, the drivers performed a substantial amount of production work and worked side by side with those employees frequently. That is not the case here. And, in *Calco*, there were production and maintenance employees who performed driving work, also a factor not present here.

The Intervenor cites two other cases in its brief that I also find factually distinguishable. The Board in *American Sunroof Corp.*, 243 NLRB 1128, 1130 (1979), included drivers in a production and maintenance unit. However, in that case, there was evidence, not present here, that drivers occasionally perform "detailing" work performed by the production and maintenance employees, and, similarly, the production and maintenance employees occasionally performed driving work. Here, there is little evidence that the drivers perform production work on a regular basis, or, visa versa, that the production employees perform driving work.

As for the final case cited by the Intervenor, *Calpine Containers*, 251 NLRB 1509, 1510 (1980), there the Board included truck drivers and forklift operators in a larger production unit partially because they all performed forklift work and the drivers, in the off season, performed production work. Here, there is little evidence to establish that drivers perform production work with regularity.

[43] Included in this unit should be all employees who drive the Employer's trucks. From my reading of the record, they include drivers of tractor-trailers, boom truckdrivers, spider trucks drivers, flatbed truckdrivers, and box truckdrivers. Also, the record indicates that there is a classification called warehouse driver/helper and that these employees drive box trucks. They too shall be included in the unit.

National Can, supra, the petitioner secured a 30 percent showing in the petitioned-for unit of 24 mold makers prior to the recognition of the larger unit, which consisted of 397 employees. The Board held that the petitioner's attempt to seek a smaller unit than urged by the recognized union "does not alter [the] conclusion that the employer's voluntary recognition . . . does not constitute a bar." Thus, I interpret *American National Can* as follows: if a petition seeks a unit smaller than the recognized unit, and the unit sought, or *some other smaller unit is appropriate, and* the petitioning union has the requisite 30 percent showing of interest in the smaller appropriate unit prior to the extension of recognition, the recognition agreement will not be afforded bar quality. Here, although I have found that the petitioned-for unit is inappropriate, I also found that a smaller unit, a unit of drivers, constitutes a separate appropriate unit. Moreover, the Petitioner has indicated a willingness to proceed to an election in any unit found appropriate. Having conducted an administrative investigation of the showing of interest among that unit, I find that the Petitioner had a 30 percent showing of interest in a unit of drivers prior to the recognition agreement. Accordingly, inasmuch as the drivers constitute a separate appropriate unit, and the Petitioner has a requisite showing of interest in that unit that predates the recognition, I find that the Employer's recognition of the Intervenor in the wall-to-wall unit does not bar the processing of the instant petition. The motion to dismiss is therefore denied.[44]

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by Local 1205, International Brotherhood of Teamsters, AFL–CIO, Local 2682, United Brotherhood of Carpenters and Joiners of America, or neither labor organization.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before July 2, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB No. 52 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

[44] If I had found that the wall-to-wall unit was the only appropriate unit, such a result would warrant dismissal of the petition for the following reasons: the Petitioner does not have an adequate showing of interest in that unit that pre-dated the recognition agreement and as such, the recognition agreement would bar. Even though the Petitioner indicated a willingness to proceed in any unit found appropriate, it would have to secure an additional showing of interest, which, at this juncture, would post-date the recognition.